Date: 11/01/94

******

****

In the Matter of:	*	
	*	
Disputes concerning the payment of prevailing wage rates and overtime, and proper classification by:	*	Case No.: 93-DBA-79
	*	
FOREMOST MECHANICAL SYSTEMS Prime Contractor	*	
	*	
With respect to laborers and mechanics employed by the prime contractor under Contracts No. 9-PG-81-20810, No. 9-PG-81-24210, No. 0-SP-81-0090, No. GS-07P-90-VA-C0002, and No. GS-07P-89-JXC-0013, to perform mechanical work at the Denver Federal Center in Denver, Colorado Respondent	*	

****

Appearances:

Kristi Floyd, Esquire
Office of the Solicitor
U.S. Department of Labor
1999 Broadway, Suite 1600
Denver, CO 80202
For the Administrator

Gayle V.L. Young, Esq.
P.O. Box 368
Westminster, CO 80030
For the Respondent

Before: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER

The Administrator, Wage and Hour Division, filed an Order of Reference, in the above-captioned case, on August 16, 1993, regarding the payment of prevailing wages and overtime pay by Foremost Mechanical systems ("Respondent") on the five contracts

listed in the heading, above, pursuant to the Davis Bacon Act ("DBA"), 40 U.S.C. §276a, **et. seq.**, and the Contract Work Hours and Safety Standards Act ("CWHSSA"), 40 U.S.C. §§327, **et. seq.** On January 17, 1993, Joe W. Kardoley, Respondent's owner, requested a hearing on this matter.
This matter was assigned to this Administrative Law Judge and hearings were held in Denver, Colorado, on April 13 and 14, 1994. At the hearings, the parties were given the opportunity to offer their witnesses, documentary evidence and oral arguments in support of their respective positions. The parties requested the opportunity to file briefs and an appropriate briefing schedule was established.

The following references shall be used herein: TR for the official hearing transcript; ALJ EX for an exhibit offered by this Administrative Law Judge; GX for an exhibit offered by the Administrator and RX for an exhibit offered by the Respondent.

Post-hearing, Respondent has offered "supplementary government contracts ... that refer to government contract exhibits 1,3,5,9 and 12." (RX 10) The parties requested a short extension of time within which to file their post-hearing briefs (RX 11) and the request was granted. Attorney Young, by letter dated June 26, 1994 (RX 12), clarified and further identified RX 11. Briefs were timely filed and they have been admitted as GS 22 and RX 13, respectively. The record was closed on July 26, 1994, as no further documents were filed.

The following issues have been presented to me for resolution:

1. Whether Foremost Mechanical Systems ("Respondent") Misclassified its Employees as "Mechanical Laborers" on the Contracts in Question?

2. If Respondent did Misclassify its Employees on the Contracts in Question, what Adjustments to the Wages Paid to these Employees would be Appropriate?

3. Whether Dennis Hartley Waived his Right to Wages Owed Him When He Entered into a Settlement Agreement with Foremost Mechanical Systems?

4. Whether or not the Actions of Respondent were Sanctioned by the Contracting Officers and its Agents such that Respondent Reasonably Relied on Government Agencies with Regard to the Classification of Mechanical-Laborer in Classification of Its Employees?

5. Whether the Department of Labor Violated Respondent's Procedural Due Process Rights by Failing to Follow Requirements under 29 CFR Part 5, 6 and 7?

6. Whether the Equal Access to Justice Act (EAJA) applies to the

Case at Hand?

SUMMARY OF THE EVIDENCE

1. RESPONDENT'S VERSION

Foremost Mechanical Systems ("Respondent"), a sole proprietorship operated by its president, Joe W. Kardoley, has been in the business of heating, air conditioning, and ventilation since 1985. (TR 357) Mr. Kardoley has had 35 years experience as a steam fitter, pipefitter, master plumber, and certified welder and holds numerous licenses and certificates in these areas. In addition, he has been an instructor in welding at Red Rocks Community College (TR-359) and continues to attend continuing education seminars in the areas of refrigeration and heating. (TR 359) Because of his extensive experience, Mr. Kardoley was certified by this Court as an expert in these areas at the hearing. (TR 360)

In 1989, Respondent entered into 5 contracts with the federal government to provide heating, air conditioning and ventilating services to different government agency buildings. These were the Bureau of Reclamation (GX 1) (9-PG-81-20810)($15,620), (GX 3, 9-PG-81-24210) ($15,580), and (GX 5, No. O-SP-81-0090), General Services Administration (GX 9, GS-07P-90-VA-COOO2) ($2,460), and (GX 12, GS-O7P-89-JXC-0013). The period covered by the contracts began in April, 1989 and ended in January, 1990. The contract in Building 67 was merely an extension of a contract which the Respondent had completed in 1987 to perform induction unit work. The Respondent has no past history of labor violations under the Davis-Bacon Act and the Respondent has entered into approximately 25 contracts with the federal government ranging in amount from $75 to $170,000 since 1987. (TR 364, 365) In fulfilling the contracts in issue Mr. Kardoley's procedures and practices, especially with respect to his hiring of employees, were in every way consistent with the way he had been accustomed to doing them in fulfilling these previous government contracts.

As evidence of these past practices, evidence concerning Mr. Kardoley's 1987 contract was submitted. During the 1987 contract, Mr. Kardoley hired Richard Steiner, whom he classified as a mechanical-laborer, and Mr. Steiner performed the work of a mechanical-laborer. These tasks included such things as handing Mr. Kardoley tools and pulling on a chain pull. (TR 369) Mr. Steiner was interviewed by Duane Chesley, a compliance officer who conducted a Labor Standards Interview. Mr. Chesley never disputed his classification as mechanical-laborer or the rate at which he

was paid ($12.50 per hour). (TR 371) The Respondent also submitted weekly certified payroll records which showed Mr. Steiner's classification as mechanical-laborer. (TR 373)

The projects in question required Respondent to furnish and install parts to the refrigeration system for the mezzanine floor (GX 1) and revise the existing heating system in building 56(GX 5), provide auxiliary cooling in building 67 (GX 3), to perform duct modifications in building 41 (GX 9), and to make HVAC (heating, ventilation, and air conditioning) repairs to building 67 (GX 12).

Incorporated as part of the contracts were Wage Determinations: CO-89-4, CO-88-4. The classification, "Laborers, Group 3" was listed in each wage determination, along with the classification definition: Group 3; Mechanical, Air, Gas and Electrical Power Tool Operators, Burners on Demolition, Gunnite Nozzlemen, and Sandblasters. These workers are paid $12.24 per hour. The schedule also lists four groups of Laborers, numbered 1-4. Laborers in Group 1 are defined as Final Cleanup Laborers who are paid $5.75 per hour. Laborers in Group 2 are defined as General Cleanup Laborers who are paid $11.99 per hour. Laborers in Group 4 are defined as Mason Tenders who are paid $13.59 per hour. Subsequent wage determinations showed that Group 3 Laborers were deleted, and a new classification, HVAC technician, was added. (TR 402)

Depending on the needs of the job, the Respondent hired employees using the following job classifications: Welder, pipefitter and mechanical-laborer. As a journeyman in the areas of welding, plumbing, steamfitting and pipefitting, Mr. Kardoley performed all journeyman work as indicated in the payroll records. The only exceptions to this were when others were occasionally hired to perform some of the pipefitting or welding work, or when some of his employees performed duties outside of their mechanical-laborer job classification without authorization. (TR 392)

The following employees worked under Mr. Kardoley on the above-referenced contracts:

Dennis Banks worked on buildings 56 and 67. Respondent hired Dennis Banks as a mechanical laborer to assist his uncle, Lawrence Banks, who was already working for Respondent as a pipefitter on building 67. Dennis Banks' specific duties included checking controls on smaller thermostats (TR 378), carrying buckets, moving furniture, holding ladders (TR 413), carrying the compressors up the stairs and acting as fire watch. (TR 431) Mr. Kardoley performed all of the welding and fitting of heat exchangers and pumps when Dennis Banks worked for him. (TR 380)

Anthony Lell worked on building 48 on contract no. GS-07P-90-VA-COOO2, building 56 and building 67. On building 48, Mr. Lell's only tasks were to pass tools to Mr. Kardoley and hold the ladder

on which Mr. Kardoley stood (TR 385-386, 424). On building 48, since the building arrived prefabricated, the sheet metal work had already been done and Mr. Kardoley merely pieced it together. (TR 424-425) Thus, Mr. Lell did not have any opportunity to perform any sheet metal work. On building 56, Mr. Lell merely held the pipe as Mr. Kardoley worked on it and did not perform any pipefitting work himself. (TR 388) His use of a torch on this job falls within the mechanical-laborer job classification because it involves demolition work. Mr. Lell sometimes had attendance problems; not showing up for work without calling, or working just part of the day. (TR 387-388, 393)

Anthony Gonzales worked on buildings 56 and 67. On building 56, he was initially hired as a pipefitter-welder and paid $21.20 per hour. (TR 389, 391) When he worked as a mechanical-laborer, he was paid $15.00 per hour. Mr. Kardoley planned to lay off Mr. Gonzales when the jobs were completed, but Mr. Gonzales pleaded with Mr. Kardoley to keep him on the payroll because of his family's financial circumstances. Because the contracts were winding down, Mr. Kardoley was only able to offer him work as a mechanical-laborer on building 67, work involving flushing induction units. Mr. Gonzales agreed to accept this position. Mr. Kardoley paid him $15.00 per hour on (GX 5, Contract Solicitation No. 0-SP-81-00090). When Mr. Gonzales worked as a Mechanical-Laborer/Welder on building 67, he was paid the higher welder's rate. (TR 389-391)

Dennis Hartley worked on building 56 primarily as a Mechanical-Laborer and, for two days, as a pipefitter. (TR 395) When he worked as a pipefitter, he was paid appropriately for those hours. (TR 395) Mr. Hartley was admonished on several occasions to do no welding, but he tried to weld anyway (TR 396) and the Respondent was finally forced to take extraordinary measures, sending Mr. Hartley to Thornton to work on a non-government job, in order to prevent Mr. Hartley from welding. Mr. Hartley used a torch appropriate to his classification as a mechanical-laborer. **(Id.)**

Respondent filed the weekly certified payroll records (WHO347) required under the contracts on a timely basis. These payroll sheets showed the employee's classification, their rate of pay and benefits, along with the actual time spent on each project and the total amount of earnings for the week. There was no dispute with the federal agencies or with Respondent's employees during the contract terms as to the classification of the employees or that they were not performing work not contained in their classification. The employees accepted their pay checks without objection. It was not until after they were laid-off in December, 1989 - January, 1990 that Anthony Lell, Anthony Gonzales and Dennis Hartley filed their complaints with the Department of Labor. For the most part, Mr. Kardoley performed all of the skilled labor that did not fall in the category of mechanical laborer. The payroll

records accurately reflected the actual hours of Mr. Kardoley and his employees who worked in each classification.

Respondent was first notified in February or March, 1990 that a complaint had been filed against him (TR 403) and he met with Chuck Plante, investigator, on three occasions beginning in August, 1990 (TR 404-405) providing him access to his records and certified payroll sheets. Respondent also cooperated with other government officials in the investigation of this matter. It was not until February, 1991, that another meeting was held in which a demand was made upon Respondent to make payments to his former employees. (TR 407)

II. ADMINISTRATOR'S VERSION

A. Coverage Under the DBA and CWHSSA

Respondent was the prime contractor on five contracts to perform mechanical work at the Denver Federal Center, Denver, Colorado and all contracts were subject to the labor standards provisions of the DBA and CWHSSA, as so stipulated at the hearing. (TR 32) All contracts were subject to Wage Determination ("WD") CO89-4. All WDs, except for the one attached to contract no. GS-07P-89-JXC-0013, included modification 2. (GX 11), Contract no. GS-07P-89-JXC-0013's WD included modification 1. (TR 283; GX 13) For the purposes of this matter, both modifications contained the same relevant classifications and wage rates. (TR 283)

B. Prevailing Wages

The DBA requires that each contract over $2,000, for the construction of public buildings or public works, to which the United States is a party, contain a clause setting forth the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. Contractors are required to pay their contract employees no less than the "locally prevailing" wages and fringe benefits. The DBA assigns to the Secretary of Labor responsibility for predetermining the prevailing wage rates and fringe benefits to be paid on contracts. 40 U.S.C. §276a(a). In order to carry out this responsibility, wage surveys are conducted by Wage and Hour offices of the Department of Labor.

Marlene Page, the Director of Government Contract Enforcement for the Wage and Hour Division of the United States Department of Labor, explained the process through which wage surveys and the resultant WDs are created. Initially, inquiries are sent out to various companies that perform a certain type of work[1] in a certain

[1] There are four types of construction which are surveyed: highway, heavy, building and residential. (TR 251)

region or state. When the various companies return the questionnaires, the wage analyst checks the information to ensure that it complies with the set parameters for the survey. The requests for information are sent to both union and non-union employers. The information is then compiled and a computer program is generated to mathematically compute the prevailing wage rate for each craft surveyed. If union rates prevail, as they do in the above-captioned contracts, it means that more than half of the responders who employed people in a particular craft, were signatories to the union contract and paid the union rate. The prevailing wage rate is then placed in the WD for the particular classification surveyed. Ms. Page went on to explain that she had reviewed GX 11 and 13 and determined that union rates had prevailed for both Steamfitters or Pipefitters and for Sheet Metal Workers. (TR 243, 250-254) Additionally, the business managers for both the Pipefitters and Sheet Metal Workers, as well as independent contractors in both of these fields testified that union rates had prevailed during the relevant time period. (TR 157, 174, 189, 232)

When union rates prevail, the Department of Labor ("DOL") accepts the jurisdictional lines of the unions involved. (TR 255) The only time that there would be a deviation from this practice is when two unions both claimed the same type of work (TR 255) and then that jurisdictional dispute would have to be resolved. However, no such dispute is present in the situation at hand. At the hearing, after reviewing all five contracts involved, Ted Doxtater, Business Manager for the Colorado Laborer's District Counsel, Mike Salazar, Business Manager for the Sheet Metal Worker's Union, Local 9, and Dennis Cole, Business Manager for the Pipefitters,[2] Local Union 208, all agreed that the work involved on the contracts at issue would belong to either the Pipefitters or Sheet Metal Workers. (TR 191-3, 233-247) They further testified that Laborers do not work in conjunction with either Pipefitters or Sheet Metal Workers and that Laborers would not be employed to perform any of the tasks on the contracts at issue. (TR 142-4, 149, 186, 194, 226, 240, 246-7) Additionally, Dennis Cole and Mike Salazar testified that neither the Pipefitters Union nor the Sheet Metal Workers Union has a "helper" classification. (TR 186, 226). Finally, none of the workers employed by Respondent were registered apprentices under either program. (TR 410)

---

[2] Although the WD uses the term Steamfitter, various professionals, including the Respondent, himself, testified that the terms Steamfitter and Pipefitter may be used interchangeably and that any functional distinctions from the past have basically vanished. (TR 223, 360)

C. The Classifications At Issue

Respondent employed Pipefitters and Sheet Metal Workers on all five of the disputed contracts. However, in almost all circumstances, Respondent listed these employees as Mechanical Laborers, a classification not listed in the applicable WDs. (GX 2, 4, 6, 10, 11, 13 and 14) The applicable wage rate for Steamfitters or Pipefitters was $21.20 per hour, including fringe benefits. The rate for Sheet Metal Workers was $21.80. (GX 11, 13) FMS paid the employees $12.50 per hour, while listing them as Mechanical Laborers. (GXs 2, 4, 6, 10 and 14)

At the hearing, several witnesses testified regarding the types of tasks performed and the various tools used by Pipefitters, Sheet Metal Workers and Laborers. Additionally, GX 15 and GX 16 describe in detail the jurisdiction of the Pipefitters' Union,

Allen Stone, a contractor who has been in the Pipefitting industry since 1957, testified that his business, a Pipefitting and Plumbing outfit, generally is involved in "the installation of plumbing, heating and cooling systems, air conditioners; installing the HVAC equipment, standard plumbing, et cetera." (TR 167) After reviewing the contract documents involved in this matter, Mr. Stone testified that he could tell, by looking at the contracts, the types of tasks required by each contract. The tasks required by the contracts are the types of tasks that his company would be hired to perform, with the exception of GX 9, which would clearly be sheet metal work. (TR 161-162, 168) On the other four contracts, Mr. Stone testified that Pipefitters of Pipefitter Apprentices would perform all tasks, that Laborers would not perform any tasks on the contracts and that Laborers never work in conjunction with Pipefitters. (TR 161) Mr. Stone additionally described some of the tools used by the Pipefitters: "welding as it relates to the piping trade; pipe cutter; wrenches. If we're doing refrigeration work, refrigeration evacuation equipment; tubing -- a myriad of tools." (TR 162)

Dennis Cole, Business Manager for Pipefitters Local Union 208, testified generally about the tasks performed by Pipefitters. Mr. Cole explained that Pipefitters install pipe, handle steam heat, hot water heat and air conditioning. "We put in the power houses, cooling water in the power houses, hot water in the power houses, and go all the way down to commercial, residential and the same thing; refrigeration units, low-temperature refrigeration." (TR 223) Mr. Cole also testified that, although Laborers might work on the same site as Pipefitters, they would never assist or work in conjunction with Pipefitters. (TR 226) In fact, Laborers would not even be allowed to carry pipe or compressors to the work site. (TR 245; GX 15, p. 45, regarding transporting materials to the site). Tools of the trade include "pipe wrenches, pipe cutters, pipe reamers, welding equipment, 747s to put up shields, to put hangers up and then run the pipe in the hangers; move the pipe around ..."

according to Mr. Cole. (TR 225) Mr. Cole, after reviewing the contracts contained in GX 1 - GX 14, stated that the tasks required by the contracts would be performed either by Pipefitters or Sheet Metal Workers. (TR 233-240) Laborers, according to Mr. Cole, would not perform any of the tasks required by these contracts. (T-240) Unless registered apprentices were used on these contracts, the employees performing the work on the contracts would have to be paid Pipefitter wages (or, in some cases, Sheet Metal Worker wages), even if they were not journeymen Pipefitters. (TR 421)

William Davis, who has been a Sheet Metal Worker for 26 years and a Superintendent for eleven years, described the types of tasks typically performed by Sheet Metal Workers. "Most of our work deals with the transference of air by means of a sheet metal duct, either round or square. We do air conditioning, we do heating, we do venting, most anything that would have to do with sheet metal." (TR 172) Mr. Davis, after reviewing GX 9, stated that this contract involved the installation of 12 inch round return air duct work, and that this entire contract would be performed by Sheet Metal Workers. (TR 176) The types of tools used by Sheet Metal Workers include "snips; straight snips, rights, lefts, maybe double cuts; some device for hangers, either a gun or a drill to drill the concrete; drills and a ladder." (TR 176) Mr. Davis stated that Laborers would not perform any work on GX 9. (TR 176)

Mike Salazar, Business Manager for the Sheet Metal Workers Union, Local Union 9, testified that he had total authority regarding the jurisdiction of Sheet Metal Workers in the State of Colorado and that "Sheet Metal Workers do everything that has to do with the fabrication and installation of heating, ventilation and air conditioning systems. That means that they fabricate all duct work, they can install the duct work that they fabricate. They also install the various types of equipment that furnish air into those systems. They do very many different types of ventilation systems for taking bad air out of buildings, inducing clean fresh air into buildings ... Just almost everything and anything that is built out of sheet metal the Sheet Metal Worker can do." In the field, the types of tools used by the Sheet Metal Worker include various snips (right, left aviation, bolt-on, straight, etc.), power operated hand-held shears, drill motors, screwdrivers, pliers, hammers, saws and whatever else may be necessary to work with sheet metal. After reviewing the contract documents contained in GXs 1-14, Mr. Salazar stated that all tasks required by the contracts would be performed by either Pipefitters or Sheet Metal Workers. Sheet Metal Workers would perform the tasks required on GX 9. Mr. Salazar testified that Laborers would not be used to perform any of the tasks required by GX 9 and further stated that Sheet Metal Workers never work directly with Laborers. (TR 187, 188, 191-194)

Respondent classified its employees as Mechanical Laborers on the contracts at issue. Numerous witnesses testified that there is

no such classification in the WDs and that the term "Mechanical" contained under the Laborers' classification, Group 3, referred to the types of **tools** that could be used by a Laborer, rather than to a classification of employees, (TR at 143, 146, 149-152, 247, 273, 303, 307). Even Respondent's own witness, Duane Chesley, had never used the term Mechanical Laborer and treated the classification as a regular Laborer classification. Mr. Chesley also described the Group 3 under the Laborer classification as referring to **tools** used by a Laborer, rather than a classification. (TR 319, 321, 322)

Ted Doxtater, Business Manager of the Laborers' Local in Colorado, testified regarding the jurisdiction of the Laborers' Union. Mr. Doxtater testified that a Laborer, Group 3, would have no part in assisting a Pipefitter or a Sheet Metal Worker. (TR at 140-142). After reviewing the contract documents contained in GXs 1-14, Mr. Doxtater stated that Laborers, of any kind, would **not** perform any of the tasks required by these contracts. (TR at 142). Mr. Doxtater explained in detail that the Group 3 portion under the Laborers' classification referred to **tools** rather than to a type of classification of employee. (TR 143-6, 148-9)

D. The Contracts And The Tasks Performed On The Contracts

i. Contract No. 9-PG-81-20810, GX 1:

Government Exhibit 1 is a contract with the Bureau of Reclamation for the installation and replacement of a refrigerated compressor, a dryer and refrigeration piping in building 56. (TR 68) Mr. Cole testified as to what would be required on this contract, stating that a "Pipefitter would get the unit, if it's a package unit where the compressor and evaporator are all one unit, they'll set that and then they'll pipe out of that system to the evaporator and pipe back with this inch and five-eights and seven-eights copper, and to do that they would go through and put shields in the roof or in the ceiling, I should say, they're on the walls; cut the -- measure and cut the pipe with tubing cutters, take a reamer and ream the inside, take sandcloth and sand the outside of the pipes and the inside of the fittings, put them together and probably silver solder them using an oxyacetylene rig." (TR 234-5) Mr. Cole categorically stated that Pipefitters would perform all of these tasks, as outlined in GX 15. (TR 236-7)

Dennis Banks, who was classified as a Mechanical Laborer on this contract, testified that he worked in building 56 putting in exhaust fans, running a few controls and working with Mr. Kardoley and another individual on an air conditioning unit in the roof. (TR 200) Mr. Banks testified further that he used wrenches, screwdrivers, grinders, pipe wrenches, soldering torches and cutting torches, as well as other basic hand tools. (TR 202)

Charles Plante, investigator for the Wage and Hour Division, determined that Dennis Banks was misclassified, based on his

discussions with the Pipefitters' Union and Laborer's Union and Mr. Plante concluded that Dennis Banks should have been classified as a Pipefitter on GX 1 and should have been paid at the rate of $21.20 per hour, rather than the $12.50 per hour that he was receiving. (TR 271-274)

Moreover, Dennis Banks was working with or assisting Joe Kardoley, a Journeyman Pipefitter, and Don Boswell, classified as a "HVAC Ser. Technician."[3](GX 2) Since the WD does not contain a Helper classification and since Mr. Banks was not a registered apprentice, Respondent was required to pay Dennis Banks the Pipefitter rate. (TR 241)

Mr. Plante computed back wages for Dennis Banks by subtracting $12.50 per hour from $21.20 per hour and then multiplying this figure by the number of hours worked. (TR 274) Back wages due under the DBA are $1,757.40. Due to the misclassification, overtime was paid at the incorrect rate ($12.50 x 1.5 = $18.75, instead of $21.20 x 1.5 - $31.80), resulting in additional back wages due under CWHSSA in the amount of $70.98. Total back wages computed on this contract are $1,828.38. (GX 2, GX 17, p.1)

ii. Contract No. 9-PG-81-24210, GX 3:

Government Exhibit 3 is a contract with the Bureau of Reclamation for the modification of the heating and air conditioning system in building 67. (GX 3) Mr. Stone testified that the work involved on this contract would either be performed by Pipefitters or Sheet Metal Workers, depending on whether the modifications were being made to the air (duct) or piping system. (TR 169) Government Exhibit 3, Section K, further defines the type of work to be performed on the contract and states that the intent of the project is "to provide auxiliary cooling for the S.W. office of the 14th floor ..." Paragraph 13, of Section K, requires that "the Contractor shall relocate any existing piping and/or conduit as necessary so that the new cooling unit can be installed." **(Id.)**

Dennis Banks and Dennis Hartley were classified as Mechanical Laborers on this contract. Mr. Hartley testified that all the work he did for Respondent at the Denver Federal Center was Pipe Fitting/Welding. (TR 109) Mr. Kardoley testified that in all buildings in which Dennis Banks assisted him, Kardoley was either doing Pipefitting or Sheet metal work. Mr. Kardoley admitted that

---

[3] Although the applicable WD does not list a HVAC Ser. Technician, no violation was charged as Don Boswell was paid Pipefitter wages. Mr. Kardoley explained that he used this designation as a further breakdown of the Pipefitter classification. (TR 428-9)

Banks was not registered as an Apprentice for either trade. (TR 409-410)

Government Exhibit 4, the certified payrolls that accompany GX 3, list Dennis Banks and Dennis Hartley as Mechanical Laborers. (GX 4) Both employees were performing the work of Pipefitters on this contract and should have been so classified. (TR 276) Charles Plante computed back wages for both employees by subtracting the Mechanical Laborer rate ($12.50) from the Steam Fitter rate ($21.20) and multiplying this by the number of hours worked by each employee (TR 277) Mr. Hartley was credited $250 on this contract based on additional monies that he had previously received from Mr. Kardoley. (TR 277) Total back wages computed for DBA violations are $728.75. (GX 4, GX 17, p.2) Mr. Hartley worked 80.5 hours on this contract and is owed $700.35 (80.5 hours x $8.70, the difference between $21.20 and $12.50). dennis Banks worked 32 hours on this contract and is owed $278.40 (32 x $8.70).

iii. Contract no. O-SP-81-00090, GX 5:

Government Exhibit 5, a contract with the Bureau of Reclamation, is also for the modification of the heating system for wings 1300, 1400, 2300 and 2400, in building 56. (GX 5) Section K again provides a more detailed description of the work to be performed on this contract and much of the work involved the replacement and relocation of heat exchangers. The specifications additionally require the piping system to be flushed and hydrostatically tested after the revision of the piping work. (Section K.2, ¶ g) Temperature control panels were to be relocated and a new "condensate" pump was to be provided to serve the heat exchangers.

Mr. Kardoley classified himself as a Pipefitter/Welder on this contract and classified Edward Gonzales as a Pipefitter/Welder on this contract. (GX 6) As already noted, none of the employees involved were registered apprentices or Helpers. (TR 410)

Anthony Lell testified that, while working for Respondent, he did basically everything a Pipefitter does, except for welding. This included tasks such as, cutting and fitting pipe; cutting, threading and screwing pipe together; cutting, fitting and soldering pipe together; taking out circulating pumps and installing new ones; installing hanger systems for the piping; and entering systems for the piping and equipment. (TR 35) Mr. Lell was a journeyman plumber at the time he worked for FMS and has been involved in the plumbing/pipefitting industry since 1977. (TR 33) Mr. Kardoley admitted that Lell would have known what tasks a Pipefitter would perform, as he was a journeyman at the time. (TR 383)

Mr. Kardoley testified that, in building 56, the employees were removing the existing heating system and reusing the pipe in

the new system, to the greatest extent possible. (TR 397, 420) Because the piping was to be reused, Mr. Hartley did the cutting, as Mr. Kardoley thought that he would do the best job. (TR 397) Mr. Hartley's time cards show that he did welding in building 56 during the weeks of September 30 through October 10, 1989. (GX 21) William Copeland did not testify at the hearing, but is listed on the certified payrolls for this contract. (GX 6) Mr. Kardoley testified that Mr. Copeland was the Leadman on this project, although there is no Leadman classification in the WD.(TR 423;GX11)

Again, Allen Stone and Dennis Cole testified that either Pipefitters or Sheet Metal Workers would be used on this contract, depending on whether the work involved air ducts or pipes. (TR 169, 237-8) Because two individuals are listed as Pipefitters on the certified payrolls, it is reasonable to conclude that the work involved pipefitting rather than sheet metal work. (GX 6) In any event, Anthony Lell, Dennis Hartley and William Copeland were misclassified as Mechanical Laborers, while performing pipefitting work and assisting other Pipefitters. As previously discussed, Laborers are **never** used to assist Pipefitters. Clearly, Laborers should not have been used to perform the tasks on this contract. (TR 142, 144, 161, 226, 240, 246-7)

Charles Plante computed back wages totalling $1,941.60 for the three employees who were misclassified on this contract. (GX 17, p.3) Mr. Plante again subtracted the amount paid from the wage rate owed and multiplied this figure by the number of hours worked by the employee. (TR 278-280) William Copeland was paid $15 per hour while Dennis Hartley and Anthony Lell were paid $12.50 per hour. (T 279; GX 6) Anthony Lell is owed $1,191.90 (137 hours x $8.70) Dennis Hartley is owed $402.50 (75 hours x $8.70 - $250 credited for payment previously received from Respondent). William Copeland is owed $347.20 ($21.20 - $15.00 = $6.20 per hour x 56 hours). (GX 6)

iv. Contract No. GS-07P-90-VA-C0002, GX 9:

GX 9 is a contract with the General Services Administration for the installation of 12" round return air duct work in building 48. (GX 9) Mr. Kardoley testified that he performed sheet metal work in building 48 and the Anthony Lell assisted him and handed him tools, including a staycon gun, power activated firing device, tin snips and aviation snips. (TR 419) Lell was not registered as an apprentice, nor was there a classification for Sheet Metal Worker Helper. (TR 419-420) William Davis, after reviewing GX 9, testified that the work required by this contract would be performed exclusively by Sheet Metal Workers. (TR 176-177) Similarly, Mike Salazar agreed that the work would be performed by Sheet Metal Workers. (TR 191) Mr. Lell who testified regarding the sheet metal work that he performed at building 48, stated that he folded sheets of sheet metal over, which would snap into

sections, and that he would join the ends, crimp them, screw them together and then hang them in the ceiling with steel straps. He further testified that he used right-hand snips, left-hand snips, straight shears, screw guns and a power activated tool ram set in the performance of these tasks. (TR 39,40)

Charles Plante again computed back wages on this contract for the misclassification of Anthony Lell as a Mechanical Laborer. (TR 281) Plante subtracted the $12.50 per hour that Lell was paid from the $21.80 per hour that he should have been paid and arrived at total back wages due him of $409.20. (GX 10, GX 17, p.4; TR 281)

v. Government Contract No. GS-07P-89-JXC-0013, GX 12:

GX 12, a contract with the General Services Administration for HVAC repairs in building 67, involves the replacement of pumps, heat exchangers and induction air units as well as hydronic system cleaning and testing, insulation, testing and balancing. (GX 12) This is the only contract which used WD CO89-4, with modification 1, rather than modification 2. (GX 13) As noted above, the relevant rates for Sheet Metal Workers and Pipefitters are the same in both WDs.

Allen Stone, after reviewing GX 12, testified that the tasks required by this contract would be done predominantly by Pipefitters and secondly by Insulators. (TR 170) Mr. Cole testified that most of the work on this contract would belong to the Pipefitters, including the HVAC repairs, replacement of pumps, hydronic system cleaning, flushing and testing, as well as the balancing and testing of the hydronic system. Insulators would do the insulation testing and balancing. (TR 237-238)

Dennis Banks testified that he worked with another Pipefitter, Larry Banks, in building 67 and that they flushed the piping for the induction air units, and then went through each unit flushing any coils that were blocked up and identified units that needed further work. (TR 200) The Labor Standards Interview taken by Duane Chesley of Dennis Banks, corroborates this testimony. (GX 18) The tools used to flush the units included crescent wrenches, pipe wrenches and screwdrivers. (TR 208) Dennis Banks testified on cross examination that he did do work with piping. He went on to explain that, in building 67, he would help Mr. Kardoley remove and replace heat exchangers. He would get the pipe ready when removing the heat exchangers and then Mr. Kardoley would do the welding. Mr. Kardoley listed himself as a Fitter on the certified payrolls. (GX 14) Both Dennis Banks and Mr. Kardoley would then reinstall the equipment. (TR 209-210)

Mr. Kardoley testified that Messrs. Lell and Gonzales replaced 45 induction units in building 67. (TR 382) GX 19, a Labor Standards Interview of Mr. Lell, shows that he was "demonstrating

induction unit operation" at the time of the interview. Additionally, Mr. Lell told the investigator, Duane Chesley, that he was a Fitter. Mr. Chesley stated, on the form, that Mr. Lell was not properly classified and paid. (GX 19)

Edward Gonzales testified about flushing and replacing induction units. (TR 120-123) They would cut out the induction units, put new pipe in, run new copper pipe and install new units, using pipe wrenches, tubing cutters, flare tools and crescent wrenches. **(Id.)** Mr. Gonzales also testified that Messrs. Lell and Banks worked with him doing the same type of tasks, with the exception of welding. (TR 123) Mr. Gonzales, who has been a Pipefitter since 1972 and who is also a member of the Pipefitters' Union, testified that the tasks he now performs, as a union member, did not differ from the tasks he performed while working for Respondent. (TR 118-19, 124)

Dennis Hartley was classified as a Welder/Fitter for one week on this project and paid the correct wage rate. (GX 14 at 11) Edward Gonzales was paid the proper wage rate for two weeks, while being classified as a mechanical Laborer/Welder. (GX 14 at 13,14) However, for the next three weeks, Mr. Gonzales was paid $15.00 per hour. During the first two of these three weeks, Mr. Gonzales was listed as a Mechanical Laborer. During the third week, he was listed as a Mechanical Laborer/Welder, but still was paid only $15.00 per hour. **(Id. pp. 15-17)**

Charles Plante again charged violations of the DBA with regards to the misclassification of Dennis Banks, Anthony Lell and Edward Gonzales. (TR 286) Although Mr. Plante did not testify at the hearing regarding the misclassification of Mr. Gonzales during the work weeks beginning December 22, 1989, December 29, 1989 and January 5, 1990, the certified payrolls clearly show the violations and these violations were included into the back wage calculations listed in GX 17. (GX 14 at 15-17, GX 17 at 5)

Back wages totalling $7,874.74 were computed for these three employees for DBA violations. (GX 14, GX 17 at 5) Anthony Lell is owed $460.70 because during weeks ending 11/17/89, 12/08/89 and 1/05/90, he was paid $12.50 per hour. Accordingly, Mr. Plante subtracted this figure from $21.20 and multiplied times the number of hours worked (49 hours x $8.70 = $426.30). During the week ending 12/29/89, Lell was paid $15.00 per hour (8 hours x $6.20 = $49.60). During the week ending 1/12/90, Lell was paid $25.00 per hour and Respondent was given credit for the excess over $21.20 (4 hours x ($-3.80) = ($-15.20)). (GX 14)

Dennis Banks is owed $6867.20 (794 hours x $8.70 = $6907.80 - $40.60) which represented additional pay that Mr. Plante discovered on Dennis Banks' payroll checks. (GX 14) Additionally, back wages totalling $14.87 were computed for Dennis Banks under CWHSSA. (GX

14 at 8, GX 17 at 5)

Edward Gonzales is owed $546.84 (88.20 hours x 6.20). (GX 14)

On the basis of the totality of this closed record and having observed the demeanor and having heard the testimony of credible witnesses, I make the following:

Findings of Fact and Conclusions of Law

1. Whether Respondent Misclassified its Employees as "Mechanical Laborers" on the Contracts in Question?

Respondent denies the allegations that it misclassified and underpaid the named employees, or that it violated overtime regulations and affirms that it has fully complied with the requirements of the Davis-Bacon Act herein.

Respondent concedes that mechanical laborers employed by the Respondent on all of the contracts were subject to the provisions of the Davis-Bacon Act (40 U.S.C. 276a) and the regulations duly promulgated thereunder. Consequently, the Contractor was required to pay to its employees who worked on such projects the wages specified in Wage Determinations CO-89-4, CO-88-4 incorporated in the contract documents for such projects. Respondent paid its employees the wages stated in such Wage Determinations. Respondent also concedes that these contracts were subject to the Contract Work Hours and Safety Standards Act, 40 U.S.C. Sections 327, et seq., and Department of Labor Regulations promulgated at 29 C.F.R. Part 5.

Pursuant to 29 C.F.R. 5.22, "such wage determinations state the minimum wages to be paid various classes of laborers and mechanics based upon the wages determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the state in which the work is to be performed."

The term "wage determination" includes the "original decision and any subsequent decisions modifying, superseding, correcting, or otherwise changing the provisions of the original decision. The application of the wage determination shall be in accordance with the provisions of Section 1.6 of this title." 29 C.F.R. 5.1(a)(1)(q)

Respondent submits that Mechanical-Laborer is a valid job

classification because Mr. Kardoley uses the term "mechanical-laborer" to refer to persons who work with mechanics and who hand tools, wrenches, and otherwise assist someone who is a craftsman. A mechanical-laborer may also hold ladders, hold pull chains or use a torch, for example. (TR 363) Mr. Kardoley testified that his usage of this job classification follows that which is commonplace in non-union shops and that he has regularly encountered this job classification during his approximately 20 years of experience working in non-union shops. (TR 363)

Respondent posits that much of this dispute seems to concern the question of whether the category of "mechanical-laborers" even exists in the vocabulary of the Department of Labor's job Classification scheme. The evidence shows that over long periods of time persons having the power to make binding commitments to the Respondent on behalf of the contracting agencies, shared in Mr. Kardoley's usage of this job classification and that classification had not been challenged. Before construction under a contract begins a conference is normally held to review the work to be performed and to agree upon a job classification and wage rate schedule. At such a conference held as far back as 1989, Mr. Kardoley informed the contracting officer, Barbara Byron, that he planned to use mechanical-laborers and was told that she saw nothing wrong with that. (TR 373) There is nothing to indicate that the contracting officers on any of these contracts ever used this occasion to voice any objections to Mr. Kardoley's usage of this job classification for his workers. Nor did his usage of this job classification in his weekly certified payroll records cause any concern when they were reviewed by contracting agency officials.

Respondent also submits that usage of this job classification is widespread, at least among those officials with whom Mr. Kardoley had occasion to deal. After Mr. Lell and Mr. Hartley were laid off and they filed these complaints, they were asked to provide the contracting agency with documentation in a letter signed by Vicki Cook, contracting officer. This letter used the term "mechanical-laborer" to describe their job classification, an indication that this term was in current usage within the contracting agencies. (RX 6, RX 9)

Margaret Miller, contract specialist, also received a copy of this letter and at the time she received it, she did not think there was anything wrong with classifying these workers as mechanical-laborers. (TR 345) Moreover, according to notes which he made at the time, Duane Chesley conducted a Labor Standards Interview of Dennis Banks on behalf of the Department of Labor in which he says that he observed Dennis Banks flushing induction units while working as a "mechanical-laborer." (RX 5)

Respondent suggests that this issue also may be settled even more definitively by reference to the Wage Determinations schedule.

This schedule contains a general category of Laborers, of which one of the listed subclassifications is Group 3: Mechanical, Air, Gas & Electric Power Tool Operator, Burners on Demolition, Gunnite Nozzlemen and sand blaster. Obviously then, a mechanical-laborer is just one of the several types of Group 3 Laborers, according to Respondent's thesis.

29 C.F.R. Section 5.1(a)(1)(m) defines the "Laborers" or "Mechanics" classification given in the Wage determinations as follows:

> "It includes those workers employed by a contractor or subcontractor at any tier whose duties are manual or physical in nature (including workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. 'Laborers' or 'mechanics' includes apprentices, trainees, helper, ... Working foremen who devote more than 20 percent of their time during a workweek in performance of duties of a laborer or mechanic and who do not meet the criteria of 29 DFR Part 541 are laborers or mechanics for the time so spent"

Section 5.2(n)(4) further defines the term, "helper." A "helper" is a

> "... semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice."

Accordingly, Respondent submits that the cited regulation does, indeed, recognize workers who perform the tasks contemplated by Mr. Kardoley as "mechanical laborers" and that a proper interpretation of the Wage Determination schedule by the responsible contracting agency official would have removed this issue as a source of controversy, according to Respondent.

Respondent concedes that it was acutely aware of the limited range of duties allowed to mechanical laborers and Mr. Kardoley also knew that some of his employees possessed skills qualifying

them for more demanding job classifications. Because of this, he insisted that they only perform tasks falling within the mechanical-laborer classification and told them that they were hired only to perform mechanical-laborer work. He was further motivated in this by his concerns for his workers' safety, which could have been compromised if they were allowed to perform work with which they were unfamiliar and which was not within their classification. (TR 427)

Respondent's normal procedure when hiring new employees was to explain to them their job classification in the wage determination and also discuss with them the scope of their job duties and what functions they were not allowed to perform. (TR 375)

However, Mr. Kardoley concedes that he was not able to give each of his workers constant supervision, that some of these workers willfully disobeyed his wishes and that lapses did occur in which one or more workers performed tasks outside their job classifications without Mr. Kardoley's authorization. On each of these occasions, Mr. Kardoley admonished the workers involved, took steps to prevent such disobedience of his orders in the future and made appropriate adjustments to the wages paid to the employees.

However, according to Respondent, these lapses were never so extensive as to change these workers' basic job classifications. Furthermore, it makes little sense to reward these workers by allowing them to exploit Mr. Kardoley's inability to constantly monitor their activities and claim an entitlement to higher wage payments on the basis of having willfully disregarded their instructions not to perform other skilled work. Mr. Kardoley was diligent in his efforts to limit these workers' activities to those permitted by their job classification as shown by his testimony that he prevented Dennis Banks from doing pipefitting work (TR 378, 413) and that he told Anthony Lell not to perform any pipefitting work on contract no. GS-07P-90-VA-COOO2. (GX-9) Mr. Kardoley told Dennis Hartley, who wished to upgrade his welding skills so as to qualify for employment at Rocky Flats, not to weld (TR 375-376) and finally, as noted above, resorted to sending Mr. Hartley to Thornton to work on a non-government job to prevent him from welding. (TR-396) When, through deceptive and devious behavior, these workers succeeded in working at tasks above their job classification, they were paid at the appropriate higher wage rate, according to Respondent's basic position.

The Administrator argues that these workers could not have been mechanical-laborers since that job classification is not contained in the Wage Determination schedule and that, therefore, these workers must have been pipefitters, sheetmetal workers or some other kind of skilled workers. The testimony received from these workers themselves shows that by deception and disobedience they may have occasionally performed some of these skilled jobs,

but that this skilled work was never predominant. The Administrator's position is therefore clearly untenable. The Wage Determination schedule does allow for several categories of laborers and the only dispute should be over the question of which category of laborer is most appropriate for the work that these employees actually did, according to Respondent.

At the outset, I find and conclude that the five contracts involved are covered by the DBA and CWHSSA, as the DBA requires that "contractors and subcontractors shall pay all mechanics and laborers employed directly upon the site of work, unconditionally ... the full amounts accrued at time of payment computed at wage rates not less than those stated in the advertised specification" 40 U.S.C. §276a(a) and 29 C.F.R. §5.5(a)(1). The totality of this closed record leads to the conclusion that Respondent failed to pay its employees the rates required by the contracts and applicable WDs.

Charles Plante's investigation of Respondent covered the time period between August 22, 1988 and August 22, 1990. (TR 270) The certified payrolls contained within GX 1 - GX 14 clearly show that the misclassifications charged were for work performed within this two year time frame.

I also note that Mr. Kardoley testified that, on all five contracts at issue he, himself, performed either Sheet Metal of Pipefitter work. (TR 409-10, 419) I accept the testimony of the three union business managers that laborers **never** assist either Sheet Metal Workers' or Pipefitters. The business managers further stated that the large majority[4] of all tasks required by the contracts at issue would be within the jurisdiction of the Pipefitters' Union or Sheet Metal Workers' Union. No tasks on the contracts would be performed by Laborers. (TR 140, 142, 191-4, 226, 223-247) Moreover, none of the five employees involved were registered apprentices in either trade, and there is no Helper classification for either trade. (TR 410, 419-20) Accordingly, since the five employees performed work on the five contracts at issue, they must be paid as either Sheet Metal Workers or Pipefitters. (TR 241) This is so even if they were not journeymen and regardless of the employees' skill levels. 29 C.F.R. §5.5(a)(1)(i). **See also J.B.L. Construction Co., Inc.,** CCH Lab. L. Rep. 31,239 (1978); **Matter of Titan Atlantic Construction Corp.**. CCH Lab. L. Rep. 31,238 (1978); **see also Dembling v. Framlau Corporation**, 350 F. Supp 457 (D.C.PA. 1973), WAB Case No. 70-5

[4] Mr. Cole indicated that some of the tasks required by GX 12 would be performed by Insulators. (T 239) In any event, none of the tasks on any contracts at issue would be performed by Laborers of any kind.

(April 19, 1971)

I find most persuasive the fact that not one witness, with the exception of Mr. Kardoley, had ever used or heard of the classification "Mechanical Laborer," and there simply is no credible evidence that such term was widespread in the industry. (TR 145, 161, 177, 247, 273, 319, 321, 351) Rather, all agreed that the Group 3 subheading under the Laborer classification referred to types of **tools** used by Laborers and that this was not a separate classification, (TR 143, 146, 148-152, 247, 273, 322) I also find most persuasive the testimony of Mr. Doxtater, the person responsible for the jurisdiction of the Laborers' union. He is the person who has the greatest interest in ensuring that other unions do not take work that is within his jurisdiction and who has the greatest knowledge with regard to the type of work claimed by the Laborers' union. As discussed above, when union rates prevail in a WD, the Department accepts the union jurisdictional lines. **Fry Brothers Corporation**, WAB Case No. 76-6, at 17 (June 14, 1977). **See also Tele-Sentry Security, Inc.**, 86 DBA 33; 86 DBA 44 (Decision of the ALJ, Sept. 11, 1987), **aff's,** WAB No. 87-43 (June 7, 1989); **Jos. J. Brunetti Constr. Co., and Dorson Elec. & Supply Co., Inc.,** WAB No. 80-9 (Nov. 18, 1982); and **J.B.L. Constr. Co.**, 23 WH Cases (BNA) 1064 (Decision of the ALJ, July 18, 1978). Normally, the business agent of the union is consulted about jurisdictional questions. (TR 153, 196-7) The business managers of all three unions involved agreed that the work performed on the contracts contained in GX 1 - GX 14 was the work of Sheet Metal Workers or Pipefitters and was not the work of Laborers, even if classified as "Mechanical Laborers." (TR 142, 191, 233, 246-7)

All witnesses agreed that they could tell from their review of the contracts the types of tasks that would be required to fulfill the contractual obligations. Although certain witnesses did testify that they could not tell, from simply looking at the cover sheets of the contracts, if the work would be performed by Sheet Metal Workers or Pipefitters, they could tell that the work would belong to one group or the other and that in no case would Laborers be allowed to perform this type of work. (TR 246-7) On the contracts in which it was difficult to tell if the work would belong to the Sheet Metal Workers or the Pipefitters, Mr. Plante used the lower Pipefitter rate, giving Respondent the benefit of the doubt. Moreover, the employees' testimony leads to the conclusion that work performed on all contracts, except for GX 9, was generally that of Pipefitters. Clearly, GX 9 related to work which would be claimed by the Sheet Metal Workers' Union. (TR 176, 191)

Allen Stone and William Davis, independent contractors who perform work of the type required by the contracts at issue, reviewed the five contracts in question and testified that these are the types of contracts on which either Sheet Metal Workers or

Pipefitters would perform those tasks. (TR 161, 164-5, 168-70, 175-6) Both have a great deal of experience in their respective fields and testified as independent witnesses, with no ulterior motive. Thus, their testimony is most persuasive in resolving the issues before me.

The great weight of the testimony clearly leads to the conclusion that the WDs did not contain a "Mechanical Laborer" classification and that the five employees performing work on these contracts were required to be paid either the Sheet Metal Worker or the Pipefitter wage rate, as listed in the WDs. The improper classifications are clearly listed in the certified payroll documents for each contract; thus, there is no question that the employees were improperly classified, I find and conclude.

I simply cannot accept Respondent's reasons for failing to pay the wage rates required by the contracts. Mr. Kardoley initially attempted to shift the blame for the misclassifications by taking the position that some contracting official had told him that it was proper to classify his employees as Mechanical Laborers. However, Margaret Miller, the only contracting official who testified on behalf of Respondent, testified that she does not tell a contractor what classifications to use and that she makes the assumption that the contractors know what classifications are proper, based on the contract and the WDs. (TR 340-1, 351-2) While Ms. Miller was not sure what tasks would be performed by a Mechanical Laborer, she knew that welding would be outside of the tasks performed by Laborers. (TR 347, 351-3) Moreover, Ms. Miller testified that she never did an in-depth analysis of the tasks being performed by Respondent's employees. (TR 350)

Mr. Chesley, a witness called on behalf of Respondent, could not recall discussing the term "Mechanical Laborer" at the preconstruction conference with Mr. Kardoley, but did testify that he does not normally discuss work classifications with the contractors. (TR 317-8) Mr. Chesley has not used the term "Mechanical Laborer" and did not recall seeing it in any WD. (TR 319) In his Labor Standards Interview of Respondent's employees, Mr. Chesley simply treated the term "Mechanical Laborer" as equivalent to a Laborer. (TR 321) As noted above, Mr. Chesley stated that the term Mechanical under the Group 3 Laborer classification, only referred to the types of tools used by the workers, and does not establish a separate classification. (TR 322) Mr. Chesley also never performed any type of in-depth analysis of the tasks performed by Respondent's employees, the types of tools used by the employees, or of the applicable WDs. (TR 331-2)

While Mr. Kardoley attempted to blame the contracting officials for the misclassifications, the hearing testimony clearly leads to the conclusion that the contracting officials had no part in choosing the classifications used by Respondent in the

performance of the contracts. Moreover, even if the contracting officials had played a part in approving the use of incorrect classifications, Ms. Miller testified that the contracting agency cannot bind the DOL in these types of matters (TR 352) as the Department is the final arbiter of DBA; Charles Plante also testified that a contracting official cannot bind the DOL and that if a contractor has questions about classifications, the questions are to be referred to the Administrator. (TR 303, 311-12) 29 C.F.R. §5.13. **See Labor Servs., Inc.**, WAB No. 90-14 (May 24, 1991), **United Constr. Co., Inc.**, WAB No. 82-10; **AT&T Communications, et. al.**, CCH LLR WH Ad. Rulings, ¶32,149(WAB 1991); **LTG Construction Co., et al.**, Case Nos. 91-DBA-64/89/90/91/92/ 93/94/95; 92-DBA-29/30/31/32 (Decision and Order of this Administrative Law Judge, July 1, 1993); **Arbor Hill Rehab. Project**, WAB No. 87-4 (Nov. 3, 1987); **Warren Oliver Co.**, WAB No. 8408 (Nov. 20, 1984); **Metropolitan Rehab. Corp.**, WAB No. 78-25 (Aug. 2,. 1979); **Tollefson Plumbing and Heating Co.**, WAB No. 78-17 (Sept. 24, 1979) and **Fry Brothers, supra.**

Mr. Kardoley also attempted to justify the misclassifications by claiming that the employees were satisfied with their wages, had accepted the wages throughout the duration of the contracts and, in one case, that Dennis Hartley had entered into a settlement agreement with regard to this matter. However, these arguments are completely irrelevant. Even if the employees had agreed to the incorrect wage rate, settlement agreements or waivers of this nature are invalid. The correct WD rate must be paid "regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics." 29 C.F.R. 5.5(A)(1); **see also 29** C.F.R. 5.2(o). As the Supreme Court has held regarding the payment of minimum wages under the Fair Labor Standards Act, an employee cannot waive his rights under a statute that serves the public interest. **Brooklyn Savings Bank v. O'Neil**, 324 U.S. 697, 704 (1945). The DBA is a remedial statute enacted for the benefit of workers rather than contractors. **Thomas J. Clements, Inc.**, WAB No. 84-12 (Jan. 25, 1985) **aff'g** 82-DBA-27 (Decision of the ALJ, June 14, 1984). **See also L.T.G. Construction Co.**, **supra** at 16-20. A contractor is not entitled to receive Davis-Bacon contracts as a matter of right and an employer seeking the award of government contracts undertakes to fulfill all the Act's obligations; any other result would undermine the integrity of the DBA and its remedial purposes as intended by Congress. **Walsh v. Schlecht**, 429 U.S. 401, 411 (1977); **United States v. Binghamton Constr. Co.**, 347 U.S. 171, **reh'g denied**, 347 U.S. 940 (1954). Therefore, employees cannot waive their rights to be paid DBA wages.

The evidence is overwhelming on this issue. Respondent clearly misclassified the five employees involved as Mechanical Laborers as there is no such job classification in the WDs. These

employees should have been classified as Pipefitters or Sheet Metal Workers and paid the applicable wage rates. Respondent is clearly liable for the back wages owing to the five employees due to the misclassifications.

2. If Respondent did Misclassify its Employees on the Contracts in Question, what Adjustments to the Wages Paid to these Employees would be Appropriate.

In the event that this Administrative Law Judge should conclude that Respondent's employees were misclassified, and I have already done so in the preceding section, Respondent submits that the Wage Determination schedule, as incorporated in these contracts, gives the wage rates that would apply to their proper classifications. Since it was never argued that even if these employees were properly classified that they were not paid a wage appropriate to that classification, the question of what should be regarded as the prevailing wage is irrelevant.

However, according to the Respondent, if the definition of "prevailing wage" should somehow be deemed to be of importance for deciding this dispute, the Administrator interprets the words "prevailing wages" to mean "union wages." The definition given in the statute makes clear that union wages are not necessarily the same as prevailing wages.

29 C.F.R. Section 5.5(1)(1)(i) provides that:

> "Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in 5.5(1)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided that the employer's payroll records accurately set forth the time spent in each classification in which work is performed."

The Administrator submits that union rates and union classifications are the "prevailing wages" in this case, implying that only union wages were taken into consideration. GX 15 and 16 - collective bargaining agreements - were admitted into evidence by this Administrative Law Judge despite the Respondent's objection of relevance, and should not have been admitted. Respondent again points out that the collective bargaining agreement submitted was effective beginning in June, 1990 and that this agreement cannot be used as a reference for questions arising prior to that date. 29 C.F.R. Part 1, 1.2(a)(1) provides that the "prevailing wage" shall be the wage paid to the majority of laborers or mechanics in those classifications on similar projects in the area during the period in question. In compiling wage rate information, the Administrator

obtains information from contractors' associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to laborers and mechanics on various types of construction in the area. Section 1.3(a) Thus, union wages paid in the area are only a part of information considered in determining the appropriate wage determination, according to Respondent.

The collective bargaining agreements (GX 15, GX 16) were admitted into evidence as those agreements are routinely obtained by the Wage and Hour Division as part of its surveys of various industries to establish the Wage Determinations. Those agreements are relevant and material herein and the fact that those agreements became effective in June of 1990 is no reason not to admit them as the crucial questions herein are the misclassification of employees and the appropriate wages due them in accordance with the WDs applicable to the contracts.

I simply cannot accept Respondent's thesis that the union rate is not the prevailing rate in the Wage Determinations. It is now well-settled that the requirements of the CWHSSA are clear,"...the wages of every laborer and mechanic employed by any contractor or subcontractor in his performance of work on any contract ... shall include compensation, at a rate not less than one and one-half times the basic rate of pay, for all hours worked in excess of forty hours in the work week." 40 U.S.C. §328(A); 29 C.F.R. §5.5(b)(1).

Overtime violations were discovered on two of the five contracts involved, GX 1 and GX 12. The certified payrolls for these contracts show Dennis Banks working over 40 hours in a work week, while not receiving the correct overtime pay. (GX 2, GX 14) The incorrect overtime rate that was paid is a direct result of the misclassification of Dennis Banks, as already found above. Charles Plante calculated the overtime pay due Dennis Banks by subtracting the amount paid from the amount that should have been paid, based on the proper Pipefitter classification. (TR 275, 288) Dennis Banks is owed $70.98 on GX 1 and $14.87 on GX 12. (GX 17)

The back wages owed in this matter are straight forward and have been computed based on the certified payrolls provided by Respondent. For every hour that Respondent's employees worked on the five contracts involved, the employees are owed the difference between the Laborers' rate ($12.50) and either the Pipefitter's ($21.20) or Sheet Metal Worker's ($21.80) rate. For each contract and for each employee, Charles Plante computed the difference between the rate paid and the rate owed and multiplied this figure by the number of hours worked by each employee. (TR 274, 277, 279-81, 285-8) Mr. Plante credited additional amounts paid by Respondent and subtracted these amounts from the back wages owed. (TR 277, 280, 287) The amount owed each employee on each contract

is clearly set forth above, in the factual discussion of each contract.

Four of the five employees, to whom back wages are owed, testified at the hearing, describing the various tasks they performed on each contract. Moreover, the certified payrolls clearly set forth which employees worked on each contract and the particular classification listed for each employee. All five employees are owed the back wages found above. There is no requirement that every employee testify. **Apollo Mechanical Inc.**, WAB Case No. 90-42 (March 13, 1994); **Permis Construction Corp.** and **Trataros Construction Corp.** WAB Case Nos. 87-55 & 87-56 (Feb. 26, 1991) (both construing the principles of **Anderson v. Mt. Clemens Pottery, Co.**, 328 U.S. 680 (1946) to permit an award of back wages to non-testifying employees based upon the representative testimony of a small number of employees). Once a pattern or practice has been established, the burden shifts to the Respondent to rebut the occurrence of violations. **Permis Construction Corp., supra** at 7. Moreover, Respondent did not argue that William Copeland's situation was different in any way from that of the four testifying employees. William Copeland worked on the contract set forth in GX 5, was listed as a Mechanical Laborer and was paid $15 per hour as a Leadman. Clearly the applicable WD contains no such classification and Mr. Copeland is entitled to back wages for the misclassification, just like the four testifying employees.

Back wages are owed to five employees in the total amount of $12,797.54 ($12,711.69 for DBA violations and $85.85 for CWHSSA violations). The back wages owed to each employee are clearly set forth above. The back wages owed on each contract are also set forth in GX 17, the summary of the violations.

3. Whether Dennis Hartley Waived his Right to Wages Owed Him When He Entered into a Settlement Agreement with Respondent

The Administrator cites **Brooklyn Savings Bank v. O'Neil, et al.**, 324 U.S. 697, 65 S.Ct. 895 (1945) as dispositive of the issue of whether the Settlement Agreement voluntarily entered into between Respondent and Mr. Hartley waives Mr. Hartley's right to claim damages for wages owed to him because of alleged misclassification.

In **Brooklyn Savings**, the U.S. Supreme Court held that the release signed by the employee was not given in settlement of a **bona fide** dispute between the parties with respect to coverage or amount due and that the release constituted a mere waiver of the employee's right to liquidated damages. In **Brooklyn Savings**, the Supreme Court found that the parties knew that more than $500.00 was due at the time the employer tendered the $500.00 to the employee in return for a comprehensive release. Also, the fact that the employee refused to accept payment suggested to the Court

that there was no valid settlement.

Respondent submits that the issues and facts in **Brooklyn Savings** are distinguishable from the case at hand. When Respondent settled the claim with Mr. Hartley for $500.00, there was a genuine dispute as to the amount of wage payments owed. Because the Respondent learned that Mr. Hartley, without his consent or knowledge, had been welding on fittings that were eventually reused in the heating system, Respondent decided that it was reasonable to believe that some monies were indeed owed and entered into this Settlement Agreement in satisfaction of these obligations.

Respondent further submits that allowing Mr. Hartley to remain a party to this dispute would reopen matters covered by his Settlement Agreement with the Respondent, on which a full and final resolution had been reached, and would be tantamount to permitting a judicial breach of this agreement. The terms of the Settlement Agreement, showing the comprehensive nature of its coverage, were:

> "Due to an agreement reached between myself, Dennis Hartley, and Joe W. Kardoley, the agent for Foremost Mechanical Sys. Inc., I now, freely and voluntarily, wish to rescind my complaint, lodged against the aforementioned, Company."
>
> "The Complaint which originated while I was employed by Foremost Mechanical Sys. Inc. and which pertains to the above listed subject, and while working on the above captioned Government contracts, has been resolved to my complete satisfaction."
>
> "Consequently, I now wish to consider this matter completed and closed."

Mr. Hartley accepted payment and signed this agreement and had his signature notarized on May 10, 1990. The terms of this release show that Mr. Hartley accepted this $500.00 as the best estimate of all monies owed to him. The parties understood themselves to be entering into an agreement in which Mr. Hartley declared the matter resolved to his complete satisfaction and that the parties might be permitted to regard the matter as completed and closed.

The settlement agreement was made as a result of a **bona fide** dispute between the two parties, in consideration of a **bona fide** compromise and settlement. There is nothing in the Davis-Bacon Act to prevent the effective operation of such an agreement upon the claim for prevailing wages. The Davis-Bacon Act does not disallow an employee from waiving his rights and Respondent submits that Mr. Hartley is bound by that Settlement Agreement, should be dismissed as a party to this proceeding and is not entitled to any additional

amounts herein.

However, as already noted above, all employees of a contractor must be paid the rate(s) specified in the Wage Determination as the DBA is a remedial statute enacted for the benefit of workers rather than contractors. **Thomas J. Clements, Inc., supra; L.T.G. Construction Co., supra** at 16-20. An employee cannot waive his/her right to receive the appropriate WD rate because any waiver thereof would frustrate the purposes and undermine the integrity of the DBA and the remedial purposes intended by Congress. **Brooklyn Savings Bank, supra** at 704; **Walsh v. Schlecht, supra** at 411. The correct wage rate must be paid "regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics." 29 C.F.R. § 5.5(a)(1).

Thus, Mr. Hartley is entitled to the additional amounts due him as I find and conclude that the Settlement Agreement is not binding herein. However, Respondent is entitled to a credit for that payment made to Mr. Hartley.

4. Whether or not the Actions of Respondent were Sanctioned by the Contracting Officers and its Agents such that Respondent Reasonably Relied on Government Agencies with Regard to the Classification of Mechanical-Laborer in Classification of Its Employees?

The Respondent claims the defense of estoppel in that it relied to its detriment upon the temporary absence or inaction of government notification of any violation, that the Department is estopped from claiming that Respondent improperly used the classification of "mechanical-laborer" because the contracting officers themselves used the very same term in their correspondence with him (RX 5, 6), and because they did not object to the classification when Respondent submitted the certified payroll sheets suggests that Respondent had sufficient reason to rely on this classification.

According to **Heckler v. Community Health Services of Crawford County, Inc.**, 467 U.S. 51 (1984), the party claiming estoppel must have relied on its adversary's conduct in such a manner as to change his position for the worst and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading.

The wages the Respondent paid to each employee on the five government projects were approved by each project's contracting officers. Respondent submitted certified weekly payroll reports on the contracts required; these reports showed each employee, his work classification, payroll deductions and the net amount paid each worker. The contracting officer on each project determined

that the Respondent had complied with all labor standards and provisions which applied to the contracts; each project went through the final inspection; each contract was certified completed. According to Reorganization Plan No. 14 of 1950, the contracting agency "retains the primary responsibility for investigating violations and enforcing the Davis-Bacon Act. "**See Universities Research Association v. Coutu**, 91 LC Section 33,992450 U.S. 754, 759 n.5(1981) **See Robert v. Fitzgibbon, a sole Proprietor dba Shamrock Five Construction Company, Plaintiff v. Raymond J. Donovan, Secretary of Labor, United States Department of Labor, et al., Defendants**, 102 LC 46,619 (January 18, 1985). During the contract term and during previous contracts Mr. Kardoley had entered into with the federal government, neither the department of Labor nor the contracting agencies ever had cause to contact him concerning problems with the payrolls that were submitted or with regard to any labor violations.

Mr. Kardoley relied on the Wage Determinations as incorporated in the contracts, and the contract language itself. He carefully reviewed all documents thoroughly to ensure he was in compliance, according to Respondent.

Respondent also submits that the Labor Standards interviews also suggest that Respondent was complying with the law. With the exception of the second interview of Anthony Lell, Respondent was provided no indication that he was in violation of the law. This was only an apparent violation manufactured by Mr. Lell out of considerations for his own personal gain in light of the fact that his employment with the Respondent was due to end.

29 C.F.R. 5.2 defines "contracting officer" as a "person with the authority to enter into, administer and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer."

Pursuant to 29 C.F.R. Section 5.6(a)(3), the Federal Agency shall cause such investigations to be made as may be necessary to assure compliance with the labor standards clauses required by 5.5 and the applicable statutes listed in 5.1. Investigations shall be made of all contracts with such frequency as may be necessary to assure compliance. Such investigations shall include interviews with employees, which shall be taken in confidence, and examinations of payroll data and evidence of registration and certification with respect to apprenticeship and training plans. In making such examinations, particular care shall be taken to determine the correctness of classifications and to determine whether there is a disproportionate employment of laborers and of apprentices or trainees registered in approved programs.

29 C.F.R. Part 1, 1.6(a)(1)(2)(b), which deals with the procedures for predetermination of wage rates, also provides that "contracting agencies are responsible for insuring that only the appropriate wage determinations are incorporated in bid solicitations and contract specifications and for designating specifically the work to which such wage determinations will apply." As stated above, Respondent did not receive any notification during the performance of the contracts in 1988 or 1989, or during the previous contracts, that he was improperly misclassifying his employees or that he was interpreting the wage determinations incorrectly.

Respondent essentially submits that the consequences of the Administrator's actions were detrimental to the Respondent in that monies to which it was entitled have been withheld for the last five years. Respondent completed the work for which the government had contracted. Payment was recommended by the inspection officer. There was no indication that Respondent did not perform satisfactorily. For a small business such as Respondent's, $12,000 represents a substantial sum of money whose loss represents a significant reduction in revenues, preventing him from meeting his operating expenses and other financial obligations, or expanding his ability to provide services to his customers.
This withholding also prevents him from bidding on further contracts with the federal government. Respondent's reliance was reasonable. If a contractor cannot rely on the contracting language or the contracting officers in charge of administering the contract, then enforcement of the contract provisions becomes a matter of selective enforcement -- an arbitrary and capricious way of administering government contracts -- which prevents the contractor from ever being certain that he is in compliance with the terms of his contract and applicable law, and in which the contractor's liability becomes unlimited and unknown. Citizens dealing with the government are entitled to some minimum standard of decency, honor, and reliability. This standard cannot be met when two arms of the government claim concurrent jurisdiction and the binding acts of one can be undone by the other upon some other interpretation of the same facts. "Men naturally trust their government, and they ought not to suffer for it, according to Respondent." **Menges v. Dentler**, 33 Pa.495, 500 (1859)

Respondent has used the term "mechanical-laborer" ever since he was awarded his first contract with the federal government. At the start of each contract, the contracting officer was made aware of the number of employees he was hiring and their job classifications. There was no objection at that time to the use of the mechanical-laborer classification. Respondent, in good faith, used laborers to perform mechanical-type work. It was not until the Department of Labor conducted their investigation that Respondent was told that the Department had determined that there was no such classification as "mechanical-laborer." The facts in

the instant case are distinguishable from the facts in **Heckler**. In the present case, Respondent has lost a legal right to monies owed to him for work that was performed for the government and, as a result, has suffered a loss in income and a loss in status with the government. When a private party is deprived of something to which it was entitled of right, it has surely suffered a detrimental change in its position. **Id.** at 61.

Mr. Kardoley justifiably relied on his past experiences in all of the previous contracts he had entered into with the federal government and they reasonably became the basis of his performance and/or procedures for completing his business under the present contracts. Because he had not been told that job classifications used in these previous contracts were incorrect or that the certified payroll records were incomplete or inaccurate, he applied the mechanical-laborer classification in the same manner as he had done before. Testimony by union representatives attesting that there was no such classification as "mechanical-laborer" should be taken as relevant only to union construction projects, which in the State of Colorado would be a substantial minority of all construction projects, and this testimony can therefore be of only limited value in deciding the case at hand, according to Respondent.

Respondent further submits that the evidence shows that the contracting agencies, through the contracting officer on each contract, are charged with enforcing contractor compliance with the provisions of the Davis-Bacon Act. The facts also show that the Davis-Bacon Act as administered here by the Department of Labor on the subject of this dispute differs significantly from the Davis-Bacon Act administered by the contracting agencies. In effect, the Respondent is being required to answer to two different masters on the same questions and the Department of Labor gives no deference to the acts of the contracting agencies. The Department of Labor has not said how a contractor with no specialized knowledge of bureaucratic procedures or the basis on which overlapping jurisdiction has been delegated or shared between different agencies is to know that when a contracting officer directs him to take action to achieve compliance with the Davis-Bacon Act, this officer is not the final authority on the matter and that compliance with the officer’s directive is no guarantee of compliance with the Davis-Bacon Act. If the contracting agencies are charged with enforcing the Davis-Bacon Act but have no authority to certify the contractor’s compliance with its provisions, then without a long and tedious process of referring all questions decided by the contracting officer for review at the Department of Labor the contractor can never know where he stands. This is ridiculous, according to Respondent. If the contracting agency is charged with enforcing the Davis-Bacon Act, and regulates the contractor’s behavior with respect to the Act, the contractor

is entitled to assume that the contracting officer speaks with some authority and that directives from this officer need not be referred to some higher authority.

As already noted above, Ms. Margaret Miller, the only contracting official who testified on behalf of the Respondent, testified categorically that she does not advise a contractor as to what employee classifications should be used as she assumes that the contractor, as a knowledgeable industry person, knows what classifications are proper, based on the contractual terms and the Wage Determinations. While Respondent raises the doctrine of collateral estoppel in defense of its actions, this closed record conclusively establishes that neither Ms. Miller nor Mr. Chesley nor anyone made an in-depth analysis of the tasks and classifications of Respondent's employees until the investigation herein by Mr. Plante led him to conclude that the DBA and CWHSSA were violated by Respondent, and he so advised Respondent.

Even assuming, **arguendo**, that someone at the contracting agency had advised Mr. Kardoley that he could use the term "Mechanical Laborer," that advice is not binding upon the Administrator as the Administrator, as the duly appointed representative of the Secretary of Labor, is the final arbiter of the DBA, the CWHSSA and the implementing regulations. Thus, a contracting official cannot bind the Department and a contractor should refer to the Administrator any and all questions about any of the terms in the contract. In this regard, **see LTG Construction Co., et al.**, Case Nos. 91-DBA-64/89/90/91/92/93/94/95; 92-DBA-29/30/31/32 (July 1, 1993), wherein I concluded that Collateral Estoppel and Laches, in those circumstances, did not run against the Administrator. In **LTG Construction Co.,** I stated, beginning on page 31, as follows:

> "Plaintiff submits that he is not estopped from obtaining back wages for employees herein. Respondents argue for such estoppel on the basis of the HUD's alleged misrepresentation in its handbook (CX 38) and in its September 19, 1989 letter to PHA. (CX 42) However, Plaintiff argues that the record shows that there are no factual or legal merits to LTG's estoppel position because estoppel is irrelevant to LTG's conduct.
>
> "The basic principles of the estoppel doctrine are that a party claiming estoppel must have reasonably relied upon and/or changes position due to the conduct of the other party. **See Heckler v. Community Health Services of Crawford**, 467 U.S. 51, 104 S. Ct..2218, 2224-2225 (1984), and **Precious Metals Assoc. v. Commodity Futures**, 620 F.2d 900, 908-909 (1st Cir. 1980). In the instant case, LTG had prepared its project budget well before HUD issued CX 42. Under that budget, Veazie

Street was considered a non-prevailing wage workplace. Moreover, during the summer of 1989, Lloyd Griffin indicated to HUD Providence officials that Veazie would serve independent builders. (**See** Azar, TR 1854-1856, 1893). However, there were no independent recipients of Veazie's products, there were no contracts with other companies and virtually one hundred percent of Veazie's product went to the Turnkey project, according to Plaintiff. (**See** Poirier, TR 1451-1456; Katz, TR 2320-2321; Goodwin, TR 315)

"The Complainant submits that these facts establish that LTG, in intentionally underpaying employees, did not do so in reliance upon HUD. The handbook, CX 38, and the letter, CX 42, merely restate the legal principles set forth in 29 C.F.R. § 5.2. In no way does the handbook or CX 42 state that the DBRA does not apply to an off-site workplace of which one hundred percent of the products serve a federally-funded project. Plaintiff posits that LTG determined its course on its own long before receipt of CX 42, and not only made inaccurate statements to HUD about Veazie's purposes and activities, but in fact **did** what it had always planned to do at the Veazie Street location. Under these facts, estoppel cannot apply, for there was no reasonable reliance nor any change in position. **See, e.g., Precious Metals, supra**, at 620 F.2d 908.

"Moreover, according to Plaintiff, the estoppel doctrine does not apply even if HUD's conduct is viewed in a light most favorable to LTG and Mr. Griffin.

"The courts have had occasion throughout the years to address claims of estoppel against the federal government. From these cases have arisen well-settled principles holding that even federal employees' neglect of duty will not bar enforcement of the public interest and that a party who deals with a federal agency, particularly a party already knowledgeable in the subject area, has a duty to ascertain the law and to ensure that the federal agents with whom he/she is dealing had the binding authority sought by the party claiming estoppel. In **Utah Power & Light Co. v. United states**, 243 U.S. 389 (1916), the plaintiff, like LTG, had asserted that federal agents knew what it had been doing, did not object and impliedly acquiesced. The Court held that laches or neglect of duty by federal officers is no defense to an action to enforce the public interest.

"This same principle has been applied in a variety

of contexts. For example, in **Heckler v. Community Health Servs. of Crawford**, 467 U.S. 51, 104 S. Ct. 2218 (1984), the Court held that those who seek public funds must act with scrupulous regard for legal requirement, are expected to know the law, may not rely on conduct of government agents contrary to law and must ascertain that he with whom they deal stays within the bounds of authority. **Id.**, at 104 S. Ct. 2225-2226.

"The U.S. Supreme Court, in a case remarkably similar to this case, held that an entity which participated in a federal program had a duty to familiarize itself with applicable legal requirements, and should have sought advice from the Secretary of Health and Human Services rather than relying on a conduit and being satisfied to rely on that conduit's judgment. **Id.** at 2226. Thus, LTG should have familiarized itself with Part 5, which was applicable under the PHA contract, and should have sought advice from the Secretary of Labor. As LTG and its affiliated corporations, PGG and GHA, and Lloyd T. Griffin, Jr., their principal, did not seek such advice, they cannot now raise an estoppel defense in an attempt to defeat these proceedings, according to Plaintiff.

"The First Circuit Court of Appeals has also addressed the estoppel issue. In **Precious Metals Assoc. v. Commodity Futures**, 620 F.2d 900 (1st Cir. 1980), the court held that where an entity went ahead with an activity of doubtful legality, it could not assert that the silence of the enforcement authority provided a basis for estoppel (or laches). **Id.** at 909-910. This was particularly so in the face of clear regulations prohibiting the conduct at issue. The court condemned the attempt to "cover" uncertain legality by inquiring into its status while going ahead with the conduct itself. **Ibid.**

"The courts have held that the mistakes of one agency cannot estop another from enforcing the law. The salient cases exemplify this principle. In **Graff v. C.I.R.**, 673 F.2d 784 (5th Cir. 1982), the court held that the Internal Revenue Service was not equitably estopped from collecting tax deficiencies because HUD officials had made incorrect representations of law. The concurring opinion is on point here and Judge Brown stated at 785-786:

> Graff also argues that since HUD, putting visions of sugar plum fairies and hefty tax deductions in his head, enticed him to enter

> into this project, the Government is now estopped to deny him those deductions.
>
> We agree entirely with the tax court that no estoppel applies. In **U.S. v. Stewart**, 311 U.S. 60, 61 S. Ct.. 102, 85 L.Ed. 40 (1940), the only case directly on point cited by either side, the Supreme Court declined to estop the Commissioner from taxing income on federal farm loan bonds, although the Farm Loan Board had advertised that the bonds were tax-exempt. The Court reasoned that determinations by the Board in an area well beyond its authority could not bind the IRS, the only arm of the government charged with administration of the tax laws. That holding governs here. Whatever the conduct of the HUD officials in an area of the law in which they had neither statutory responsibility nor expertise, their mistaken assessment of the tax effect of the interest reduction payments cannot bind the Commissioner. One simple solution presented itself to Graff: make further inquiries. Either a lawyer or the IRS could have reviewed the proposal. Either would, no doubt, have noticed and pointed out the serious tax problems involved. Just as the prospective purchasers of the Brooklyn Bridge should seek another opinion before acting, so graff, receiving tax advice that quite literally was too good to be true, should have looked before he leaped. With these comments added, I concur.

"The Supreme Court, in the case cited by Judge Brown, **U.S. v. Stewart,** 311 U.S. 729, 61 S. Ct. 390 (1940), had made it clear that where an agency (Farm Board) makes unauthorized representations in printed circulars, such action cannot estop the government from enforcing the law even by an affirmative undertaking to waive or surrender a public right. **Id.** at 61 S. Ct. 108. **Also see U.S. v. Ven-Fuel, Inc.**, 758 F.2d 741, 761 (1st Cir. 1985), where the court held that federal carelessness did not give rise to estoppel where the proponent of estoppel did not review applicable regulations. Moreover, in **Falcone v. Pierce** 864 F.2d 226, 228-231 (1st Cir. 1988) the court held it would not, in effect, rewrite a federal contract absent reasonable reliance by the private party upon misleading statements. The court also held that where a longtime participant in federal housing programs had actual notice of

requirements and failed to have an attorney review the governing legal requirements, estoppel would not apply.

"Plaintiff further submits that even where a federal agent has acted beyond the scope of authority, the United States is not estopped from implementing the law. **See, e.g., Urban Data Systems, Inc. v. U.S.**, 699 F.2d 1147 **(Fed. Cir. 1983); U.S. v. One Buick Riviera Auto**, 560 F.2d 897 (5th Cir. 1977); **Walls v. Mississippi State Dept. of Public Welfare**, 730 F.2d 306 (5th Cir. 1984). **See also Donovan v. Daylight Dairy Prods., Inc.**, 102 CCH L.C. ¶ 34,616 at pp. 46,489-46,590 (D. MA), **aff'd** 779 f.2d 784 (1st cir. 1985), where the court held that where an employer has misinterpreted the advice of a compliance officer, it has no "reliance" defense and that, moreover, representations of a line enforcement official do not bind the Department of Labor.

"Plaintiff also posits that representatives of HUD did not mislead LTG respecting whether or not Veazie Street was subject to the DBRA because the HUD Handbook and CX 42 state that an off-site facility would be subject to the DBRA if it were "dedicated exclusively, or nearly so, to performance of the (federally-funded) contract or project." These statements are consistent with 29 C.F.R. 5.2.(a) (2). Thus, HUD did not mislead LTG as to LTG's DBRA obligations. Rather, HUD simply restated the law, according to Plaintiff's thesis.

"That LTG may have interpreted the handbook or the letter to infer that Veazie Street work was not DBRA work does not insulate LTG from back wage liability. LTG did not consult either HUD's general counsel or any Department of Labor office respecting its Veazie-related obligations. **(See, e.g.**, Poirier, TR 145-146) Had LTG contacted the Department of Labor, LTG could have learned that a prefabrication plant used in the development of a project, particularly a plant (1) located in close proximity to the housing sites, (2) which was located and operated wholly with reference to the project and, (3) the products of which were dedicated solely to the project, **see** Goodwin, **supra**, was subject to the prevailing wage rules of DBRA.

"Plaintiff argues, in the alternative, that even if HUD misled LTG, the Department of Labor is not estopped from obtaining back wages.

"Assuming, **arguendo** only, that HUD's letter,

handbook, and alleged knowledge of the project budget and the Veazie Street operations constituted **de facto** advice or acquiescence in LTG's understanding or belief that Veazie work was DBRA-exempt, the Plaintiff may nevertheless obtain back wages because the public interest may not be sacrificed to the interests of a private party and because the purposes and aims of the DBRA cannot be subordinated to LTG's interests, even if HUD had misled LTG.

"In summary, Plaintiff argues that the law is plain and well-settled, that the foregoing estoppel analysis also applies to the back wage issues in the context of cleaners, "owner-operators," independent subcontractors and payment of subcontractor's principals. The HUD Handbook and any HUD (or PHA) advice are similar to the Farm Board's circulars in **Stewart** or the sugarplum fairies in **Graff.** LTG had no right to rely upon them and it cannot now cite them as a basis to deny money owed to those who worked on the project. LTG should have read its own contract and reviewed or sought advice as to Part 5, according to Plaintiff.

"On the other hand, Respondents strenuously argue that Plaintiff should not prevail herein because the claims are barred by equitable estoppel.

"Estoppel acts to bar a party from asserting an otherwise legitimate claim because conduct or representations of that party have caused the recipient to act in such a way that to enforce the legitimate claim would produce undue hardship or an unjust result. The essence of estoppel is to prevent a party from asserting a claim that would otherwise be appropriate. While Plaintiff asserted against the government, Respondents argue that this is simply an inaccurate statement of the law. The First Circuit Court of Appeals, in two opinions, has reversed District Court cases founded on the concept that there could be no estoppel against the government and has acknowledged the concept. **Best v. Stetson,** 691 F.2d 42 (1st Cir. 1982); **Akbarian v. Immigration & Naturalization Serv.,** 669 F.2d 839 (1st Cir. 1982).

"The Respondents distinguish a case cited by Complainant, of **Heckler v. Community Health Servs. of Crawford County, Inc.**, 457 U.S. 51 (1984), and point out that the Court found that the facts did not present even the usual situation for the application of the principles of estoppel and thus it declined, in these important words, to express an opinion on whether there could be

estoppel against the government.

> Petitioner [a governmental agency] urges us to expand this principle into a flat rule that estoppel may not in any circumstances run against the government. We have left the issue open in the past and do so again today. Though the arguments the government advances for the rule are substantial, we are hesitant, when it is unnecessary to decide this case, to say that there are no cases in which the public interest in ensuring that the government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with the government.

Heckler, 467 U.S. at 60-61.

"Respondents reject Plaintiff's basic position that there is no estoppel against the government because the above-quoted language has been interpreted to support the proposition that there are, in fact, situations in which estoppel can be applied against the government. Davis, **Administrative Law in the 80's**, Supplement to Administrative Law Treatise, Chapter 20, p. 390 (1989).

"The application of the concept of estoppel against the government requires a three-part inquiry, according to Respondents: (1) Has there been conduct by a governmental agent or entity that has induced reasonable detrimental reliance by a private party; (2) Was the governmental conduct (or representation) authorized; and (3) If the governmental conduct was unauthorized, what interests of the government will be affected and do those interests outweigh the injustice that will be imposed upon the private party as a result of the government action. **Note Equitable Estoppel of the Government**, 79 Colum. L. Rev. 551, 558 (1979) cited in **Akbarian v. Immigration & Naturalization Serv, supra...**

"Respondents also argue that they reasonably relied upon the advice and representations of HUD officials, that they engaged in good faith discussions and negotiations with the local HUD and PHA officials, beginning with initial bidding process and that Respondents were never given the slightest impression that HUD officials had no authority to provide the opinions and advice given to Respondents. The Respondents relied upon the HUD officials because "there is no doubt that HUD as the contracting agency has the

initial responsibility for the administration of these programs." Respondents relied upon the HUD officials from September of 1989 to September 29, 1992, at which time they learned, to their extreme detriment, that the Department of Labor has the ultimate power of interpretation and enforcement of DBRA. Mr. Griffin has been constructing low-income housing in the Providence, Rhode Island area for almost twenty years and he always looked to the local HUD office for answers to his questions or concerns. Respondents posit that there "is not a single piece of evidence to suggest that Mr. Griffin was or should have been aware that the Department of Labor had a different position than that directed by HUD."

"Respondents also argue that the denial of estoppel (1) would result in a financial windfall to "private, non-governmental parties while potentially increasing government cost in implementing (HUD's) housing goals," (2) would ignore and frustrate HUD's governmental objectives and directives in maximizing the availability of affordable housing for low-income people and in providing employment opportunities for community residents, some of whom may have behavioral problems, (3) would produce an unjust result and a financial burden on Respondents because Mr. Griffin negotiated and budgeted the Turnkey Project on the basis of his discussions with the local issues of HUD and PHA and (4) would effectively put out-of-business the firm providing most of the low-income housing to the City of Providence.

"Respondents also submit that it is contrary to every equitable concept that the Plaintiff may change and modify those understandings by and between Respondents, PHA and HUD. Respondents, in asking that Plaintiff's claim for back wages be completely denied, quote the words of Justice Stevens in **Heckler, supra,** that citizens have an interest". . . in some minimum standard of decency, honor and reliability in their dealings with the government." **Heckler v. Community Health Servs. of Crawford County**, 456 U.S. at 60-61, 104 S. Ct. 2218 (1984).

"On this issue, I accept the Plaintiff's position that the estoppel doctrine does not apply against the plaintiff based on well-settled legal principles that laches or neglect of duty by federal officers or employees is no defense to an action to enforce the public interest embodied in federal statutes. **Heckler v. Community Health Servs. of Crawford**, 467 U.S. 51 (1984); **Utah Power & Light Co. v. United States**, U.S. 389 (1916).

"Moreover, mistakes of one agency cannot estop another from enforcing the law. **See, e.g., Graff v. C.I.R.,** 673 F.2d 784 (5th Cir. 1982)(the IRS is not equitably estopped from collecting tax deficiencies even though the taxpayer had followed incorrect representations of law made by HUD officials). Furthermore, where another federal agency makes unauthorized representations in printed circulars, such action cannot estop the government from enforcing the law even by an affirmative undertaking to waive or surrender a public right. **U.S. v. Stewart**, 311 U.S. 60 (1940) (the Supreme Court declined to sop the IRS from taxing income on federal farm loan bonds, **although the Farm Loan Board had advertised that the bonds were tax-exempt**). It has also been held that even where a federal agent has acted beyond the scope of authority, the United States is not estopped from implementing the law. **Walls v. Mississippi State Dept. of Public Welfare**, 730 F.2d 306 (5th Cir. 1984).

"This Administrative Law Judge, in concluding that laches and estoppel are not applicable herein against Plaintiff, also accepts Plaintiff's thesis that Mr. Griffin and his affiliated firms did not reasonably rely upon and/or did not change position due to the conduct of HUD officials as LTG had initially prepared budget estimated based on the assumption that Veazie Street was DBRA-exempt. It is obvious that the project was seriously underbid and that, after PHA added additional requirements for each unit, various "loopholes" were discovered and Respondents thereafter took advantage of the provisions relating to subcontractors, independent contractors and the cleaning issue.

"Moreover, while Mr. Griffin had made plans to use components and sections fabricated at Veazie Street to serve other independent customers, these plans were speculative and preliminary and cannot be used to justify payment of wages lower than the applicable prevailing wage as virtually all of the products built at Veazie Street were dedicated to the Turnkey Project.

"Plaintiff submits that HUD did not mislead LTG with reference to Veazie Street, independent subcontractors, owner-operators or on the cleaning issue.

"I agree. Mr. Dziok's September 19, 1989 letter (CX 42) is merely a restatement of the law; it is in response to a specific request by the PHA and actually deals with the Turnkey Project. That advice was passed on to Mr. Griffin and he acted in accordance with that information.

However, the advice he was given relates to bona fide independent contractors, subcontractors, owner-operators and independent firms, not an affiliated corporation performing the cleaning work in an attempt to evade the DBRA.

"Therefore, on the issue of back wages, I agree with Plaintiff that the public interest may not be sacrificed to the interests of a private party as the purposes and aims of the DBRA cannot be subordinated to Mr. Griffin's interests." **LTG Construction Co., et al., supra** at pp. 31-40.

In view of the foregoing, I find and conclude that the doctrines of laches and Collateral Estoppel are not available as a defense herein by the Respondent.

5. Whether the Department of Labor Violated Respondent Foremost's Procedural Due Process Rights by Failing to Follow Requirements under 29 CFR Part 5, 6 and 7.

The length of time between the alleged unlawful labor and employment practices, their investigation and demand for a hearing is unreasonable and unconscionable, and such delay by the Department of Labor resulted in injury and prejudice to Respondent. The contracting officers failed to refer any disputes on classifications and wage rates to the Administrator of the Wage and Hour Division in accordance with agency procedures for determination. Pursuant to the Contract Disputes Act of 1978 (41 U.S.C. 601-613),(e) for Contractor claims of $50,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. Respondent failed to receive a timely response to any of his inquiries.

The Respondent was first notified by letter dated February or March, 1990 that it was being investigated for labor violations. It responded denying any wrongdoing. For the next several years, the Department of Labor subjected Respondent to numerous interviews. More than three years later, on August 19, 1993 an Order of Reference was issued in the instant case. A Pre-hearing Order was subsequently issued on September 4, 1993. Finally, a hearing was scheduled for April 13 and April 14, 1994. There has been inexcusable delay on the part of the Department of Labor. **Tilo Company, Inc., W&H AdRul** (CCH), 31,114 (WAB 1977). The Department of Labor has provided no justifiable reason for this delay. The backlog of cases as cited by Chuck Plante, the compliance officer, is not an acceptable reason. The Respondent has been irreparably prejudiced by the Administrator's delay of nearly five years in prosecuting this action.

As was clearly apparent at trial, the claims have become stale. Many employees could not remember when they worked as pipefitters or welders. All they could recall is that they worked as mechanical laborers at $12.50 per hour. Mr. Gonzales clearly forgot that he was paid as a welder. Mr. Hartley did not recall the discrepancies between the two letters he provided to the Department of Labor. It is clear from the evidence adduced at trial that Dennis Banks, in particular, has little interest in the outcome of this matter, and he seemed to be of the opinion that no wages are owing.

The Department of Labor has shown a lack of good faith and dilatory tactics throughout the investigation, according to Respondent, who essentially asks that the proceeding be dismissed and the withheld money be returned to Respondent.

I cannot accept the respondent’s claim of a lack of due process herein as the courts and Wage Appeals Board have consistently approved the Department’s procedures in investigating and presenting these cases.

For example, the Department’s procedures in making investigations of labor standards violations, notifying contractors of alleged violations, providing the contractor an opportunity to answer charges and allow contractors to appeal debarment recommendations did not deny an employer its due process rights. The employer was amply informed of the nature of the charges against it and had repeated opportunities to present arguments and evidence to rebut those charges. **Matter of Cosmic Construction Co., Inc.,** WAB No. 79-19, September 2, 1980.

Moreover, due process was accorded to a government contractor at an administrative hearing on wage violations alleged against it. The contractor was fully informed of the charges; was given ample opportunity to rebut the charges; and was well represented by counsel. **Matter of Glenn Electric Co., Inc.** WAB No. 79-21. March 22, 1983, ¶ 31,443; **aff’d** (DC Pa.; 1984) 101 LC ¶ 34,571; **aff’d** (CA-3; 1984) 102 LC ¶ 34,643, 755 F.2d 1028.

It is now well-settled that the Department has the authority to establish its priorities in determining compliance with the DBA and related statutes, to determine those matters which will be formally prosecuted and those matters in which debarment will be sought. Thus, Respondent's due process rights have been protected throughout and any delay herein is due partly to such priorities and partly to an attempt to resolve this matter voluntarily.

6. Whether the Equal Access to Justice Act (EAJA) applies to the Case at Hand.

U.S.C. 5 Section 504(a)(1) states that:

> "An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought."

In the Matter of United States Department of Labor, Complainant v. Paul G. Marshall, et. al., Respondents, No. 86-DBA-00133 (June 30, 1988), an employer was entitled to attorney fees after successfully defending a government debarment action since the underlying agency proceeding constituted an "adversary adjudication" within the meaning of the Equal Access to Justice Act. The court held that the application of the Equal Access to Justice Act was not limited to litigation arguments but also applied to positions taken in agency actions that preceded the suit for attorney fees.

Respondent submits that 29 C.F.R. Section 6.6 was promulgated at the same time as EAJA and derives directly from the rules (29 C.F.R. Part 16) promulgated under the initial EAJA (Pub. L. 96-481). **See**, 49 F.R. 10626. 29 C.F.R. Section 6.6(a), implementing the provisions of the Equal Access to Justice Act, states that Proceedings under this part are not subject to the provisions of the Equal Access to Justice Act. In any hearing conducted pursuant to the provisions of the Part 6, Administrative Law Judges shall have no power or authority to award attorney fees and/or other ligation expenses pursuant to the provisions of the Equal Access Act.

> "Section 16.104(a)(2)(ii) of Part 16,29 C.F.R. 16.101 et. seq., specifically provides for the award of fees in adversary adjudications involving violations and debarments under the Walsh-Healey Act at 41 U.S.C. 39. Moreover, Section 4(a) of the Service Contract Act, 41 U.S.C. 353(a) specifically incorporates Section 39 of the Walsh-Healey Act. Section 39 of Walsh-Healey, 41 U.S.C. §35 et. seq., as relevant herein, specifically empowers the Secretary to hold hearings, wherein the adjudicative officer:
>
> > shall make findings of fact after notice and hearing which findings shall be conclusive upon all agencies of the United States, and if

> supported by the preponderance of the evidence, shall be conclusive in any court of the United States .."

Respondent further submits that the hearing in which the parties participated is a Section 554 adjudication, one in which a "hearing on the record is required by statute," and is therefore an "adversary adjudication" within the meaning of 5 U.S.C. 504(b)(1)(C) of the Equal Access to Justice Act. Violations and debarments of the Service Contract Act and the Davis Bacon Act are heard under Part 6. **See**, 29 C.F.R. 6.1, 6.15 **et. seq.** Such Part 6 proceeding is a formal adversary adjudication on the record conducted in accord with the applicable Rules of Practice and Procedure, 29 C.F.R. 6.1, 6.15 **et seq.** in which the federal government is always represented."

The Administrative Law Judge in **Paul G. Marshall, supra**, determined that a Service Contract Act debarment proceeding is as much an "adversary adjudication" as is a Walsh-Healey Act debarment proceeding within the meaning of 5 U.S.C. §554 and §504(b)(1)(C) of the Equal Access to Justice Act. Therefore, 29 C.F.R. §6.6 is in conflict with 5 U.S.C. §504(b)(1)(C) with regard to violation and debarment proceedings, just as are proceedings for violations and debarment under the Davis Bacon Act. Since the statute supersedes the regulations, 29 C.F.R. §6.6 cannot be given effect.

The Administrative Law Judge also found that 29 C.F.R. §6.6 was not promulgated in consideration of the amended EAJA and its legislative history is in conflict with EAJA, according to Respondent.

In the instant case, the hearing on April 13 and 14 was an "adversary adjudication" since it involved the question of whether the contractor had violated the Davis-Bacon Act. It required a hearing on the record due to disputed facts in the case. The federal government was required to be a party in this matter as it was the party who had withheld monies from the contractor. It was the intent of Congress in enacting EAJA that individuals not be deterred from seeking review of, or defending against unjustified government action. A party should be able to obtain qualified counsel.

The Respondent submits that it should be the prevailing party and therefore is entitled to attorney fees and costs because the position of the United States was not substantially justified or that special circumstances existed. The burden of proof lies with the federal government to prove that it was substantially justified in its actions. The standard of proof is whether a "reasonable person could think it correct." **Pierce v. Underwood**, 487 U.S. 552, 566 n. 2 (1988)

"5 U.S.C. §504(b)(1)(E) provides, as relevant herein:

> "Position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; ...

Quoting from **Paul G. Marshall**, "The legislative history clarifies the statutory language:

> 'When the escape clause was originally written, it was understood that "position of the United States" was not limited to the government's litigation position but included the action - including agency action - which led to the litigation'
>
> "Interpreting the EAJA so as to restrict its application to mere litigation arguments, and not the underlying action which made the suit necessary, would remove the very incentive for careful agency action that Congress hoped to create in **1980 National Resources Defense Council v. EPA**, 703 F.2d 700, 710 (3d Cir. 1983)" "The committee's clarification of the 'position' term is intended to broaden the courts or agency's focus of inquiry for EAJA purposes beyond mere litigation arguments and to require an assessment of those government actions that form the basis of the litigation. We believe this conclusion is implicit in the EAJA definition of the term "United States," which includes any agency and any official of the United States acting in his or her official capacity rather than merely the position taken by the government's lawyers ..."
>
> "In the cases where the private party is a prevailing defendant, the definition of "position of the United States (or agency)" necessarily includes an evaluation of the facts that led the agency to bring the action against the private party to determine if the agency or government action was substantially justified. To meet its burden of proof in these cases, the agency must demonstrate to the court or adjudicative officer that it was substantially justified."

With regard to "substantial justification," the legislative history also provides clarification:

> "Several courts have held correctly that 'substantial justification' means more than merely reasonable. Because in 1980, Congress rejected a standard of "reasonably justified" in favor of "substantially justified," the test must be more than mere

reasonableness."

The Administrator was not justified in withholding monies from Respondent. No complaints were filed by employees during the contract as to their misclassification as mechanical laborers even though they were in a position to know the difference between a skilled and unskilled laborer. Some of the complaining employees, having previously worked as pipefitters or welders, were familiar with the requirements under the Davis-Bacon Act and what was expected of them. No documentation was provided by the employees who complained even after letters were sent to them requesting supporting evidence; no attempt was made by the investigator to determine when the employees worked as mechanical laborers and when they worked in other classifications. The two letters Mr. Hartley sent to the Department of Labor as to the number of hours he worked as a mechanical laborer were inconsistent. The investigator failed to perform a thorough investigation by speaking to the contracting officers or the inspection officer who interviewed the employees. To commence an action in mere anticipation that there may be cause is contrary to our legal requirements under our system of law.

"Special circumstances" also existed in that for over a year, Mr. Kardoley made the reasonable assumption that he was complying with the requirements under the contract since no official had informed him, after he had submitted timely certified payroll sheets, that there was no such classification as mechanical-laborer or that he was filling out the sheets incorrectly. He placed reasonable reliance on their actions or inactions. Mr. Kardoley, having entered into similar contracts with the federal government previously and having filled out the payroll sheets in the same manner, reasonably believed that he was doing it correctly. Respondent engaged in no conduct which unreasonably protracted the final resolution of this matter. In fact, it was the Department of Labor that unreasonably protracted this case for the past 5 years and has denied Respondent the opportunity to fully resolve this matter in a timely manner, causing him to incur attorney fees, lost profits, etc.

On the other hand, the Administrator submits that the issue of the application of the EAJA is not properly before this Administrative Law Judge as Respondent must seek such remedy by filing a separate complaint. Moreover, proceedings under the DBA are clearly not subject to the EAJA. In **Roderick Construction Co.**,

WAB Case No. 88-39 (Dec. 20, 1990), the Board held that a DBA proceeding is not subject to the EAJA because a DBA hearing is not an "adversary adjudication" within the meaning of EAJA, since the DBA does not contain a hearing requirement. Moreover, the DOL's regulations at 29 C.F.R. 6.6(a) and Part 16 were not invalidated by the repeal of the original version of the EAJA and its later reenactment in 1985.

While this issue is moot as Respondent is not the prevailing party, I have set out the parties' positions for benefit of reviewing authorities. However, I do state that the Administrator's position is the more reasonable interpretation and I would so rule.

Accordingly, I find and conclude that Respondent has violated the DBA and CWHSSA, as alleged by the Administrator, that Respondent misclassified five employees as Mechanical Laborers, a classification not permitted by the WDs, that those employees performed the work of Pipefitters and Sheet Metal Workers on all five contracts, that those employees must be paid the appropriate wages as contained within the WD that was attached to and made a part of each contract and that back wages are owed to the five employees in the total amount of $12,797.54, as already found above.

ORDER

It is therefore **ORDERED** that the Administrator, Wage and Hour Division, or her lawfully-appointed designee, shall pay to each of the five employees identified herein the amounts due each, as specifically found herein, and such payments shall be made from the funds previously withheld by the Administrator.

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts

DWD:gcb